

**ATTACHMENT IV-1**

**Environmental Improvement Act  
NMSA 1978 §§ 74-1-1 to 74-1-10 (Repl. Pamp. 1993)**



# CHAPTER 74

## Environmental Improvement

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## ARTICLE 1

### General Provisions

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### 74-1-1. Short title.

Sections 74-1-1 through 74-1-10 NMSA 1978 may be cited as the "Environmental Improvement Act".

**History:** 1953 Comp., § 12-19-1, enacted by Laws 1971, ch. 277, § 1; recompiled as 1953 Comp., § 12-12-1 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 1.

**Cross references.** — As to environmental compliance, see 74-7-1 NMSA 1978 et seq.

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For note, "Preemption — Atomic Energy," see 24 Nat. Resources J. 761 (1984).

For note, "Look Out States ... Your Environmental Liability Could Be Bigger Than You Think," see 30 Nat. Resources J. 929 (1990).

For note, "The Toxic Time Bomb in the Borderland: Can the 'Emergency Planning and Community Right to Know Act' Help?," see 30 Nat. Resources J. 969 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control § 1 et seq.

Liability insurance coverage for violations of anti-pollution laws, 87 A.L.R.4th 444.

Governmental recovery of cost of hazardous waste removal under Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9601 et seq.), 70 A.L.R. Fed. 329.

39A C.J.S. Health and Environment § 1 et seq.



## 74-1-2. Purpose of Environmental Improvement Act.

The purpose of the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978] is to create an agency which will be responsible for environmental management and consumer protection in this state in order to ensure an environment that in the greatest possible measure: will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.

**History:** 1953 Comp., § 12-19-2, enacted by Laws 1971, ch. 277, § 2; recompiled as 1953 Comp., § 12-12-2 by Laws 1972, ch. 51, § 9.

**Common-law remedy for nuisance survives the enactment of the Environmental Improvement Act.** *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

**Board has paramount environmental improvement authority.** — It is the intention of the legislature to give the environmental improvement board

statewide, paramount authority to enforce regulations and standards in the various areas listed and that all other entities of government and political subdivisions thereof must conform. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

## 74-1-3. Definitions.

As used in the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978]:

A. "agency" or "environmental improvement agency" means the department of environment;

B. "board" means the environmental improvement board; and

C. "person" means the state or any agency, institution or political subdivision thereof, any public or private corporation, individual, partnership, association or other entity and includes any officer or governing or managing body of any political subdivision or public or private corporation.

**History:** 1953 Comp., § 12-19-3, enacted by Laws 1971, ch. 277, § 3; recompiled as 1953 Comp., § 12-12-3 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 2; 1977, ch. 253, § 34; 1982, ch. 73, § 21; 1991, ch. 25, § 29.

The 1991 amendment, effective March 29, 1991, substituted "department of environment" for "environmental improvement division of the health and

environment department" in Subsection A; deleted former Subsection B which read "'director' means the director of the environmental improvement division"; and designated former Subsections C and D as present Subsections B and C.

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

## 74-1-4. Environmental improvement board; creation; organization.

A. The board shall consist of five members appointed by the governor, by and with the advice and consent of the senate. The members of the board shall be appointed for overlapping terms, with no term exceeding five years. No more than three members shall be appointed from any political party. At least a majority of the membership of the board shall be individuals who represent the public interest and do not derive any significant portion of their income from persons subject to or who appear before the board on issues related to the federal Clean Air Act, 42 U.S.C. Sections 7401 et seq. or the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978]. Any vacancy occurring in the membership of the board shall be filled by appointment by the governor for the unexpired term.

B. The members of the board shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

C. The board shall elect from its membership a chairman, vice chairman and secretary and shall establish the tenure of these offices. The board shall convene upon the call of the chairman or a majority of its members.

**History:** 1953 Comp., § 12-19-5, enacted by Laws 1971, ch. 277, § 5; recompiled as 1953

Comp., § 12-12-5 by Laws 1972, ch. 51, § 9; 1990, ch. 31, § 1.



**Cross references.** — As to exemption of environmental improvement board from authority of secretary of environment, see 9-7A-12 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39A C.J.S. Health and Environment § 133.

### 74-1-5. Environmental improvement board; duties.

The board shall promulgate all regulations applying to persons and entities outside of the agency.

**History:** 1953 Comp., § 12-19-6, enacted by Laws 1971, ch. 277, § 6; recompiled as 1953 Comp., § 12-12-6 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 3.

**Cross references.** — For definition of "agency," see 74-1-3 NMSA 1978.

**Board's duty to prepare regulations.** — The environmental improvement board has a duty to have

the regulations prepared by a staff of its own. It has no right to delegate this authority to one who is an "interested person" at a public hearing. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 6, 134. 39A C.J.S. Health and Environment §§ 137, 138.

### 74-1-6. Department; powers.

The department shall have power to:

- A. sue and be sued;
- B. make contracts to carry out its delegated duties;
- C. enter into agreements with environmental and consumer protection agencies of other states and the federal government pertaining to duties of the agency;
- D. serve as agent of the state in matters of environmental management and consumer protection not expressly delegated by law to another agency, commission or political subdivision in which the United States is a party;
- E. enforce the rules, regulations and orders promulgated by the board and environmental management and consumer protection laws for which the agency is responsible by appropriate action in courts of competent jurisdiction;
- F. on the same basis as any other person, recommend and propose regulations for promulgation by the board;
- G. on the same basis as any other person, present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the board or any other administrative agency with responsibility in the areas of environmental management or consumer protection, but shall not be given any special status over any other party; and
- H. have such other powers as may be necessary and appropriate for the exercise of the powers and duties delegated to the agency.

**History:** 1953 Comp., § 12-19-9, enacted by Laws 1971, ch. 277, § 9; recompiled as 1953 Comp., § 12-12-9 by Laws 1972, ch. 51, § 9; 1977, ch. 253, § 35; 1982, ch. 73, § 22; 1991, ch. 25, § 30.

**Cross references.** — For definition of "agency" and "board," see 74-1-3 NMSA 1978. As to creation of environmental improvement division, see 9-7-4 NMSA 1978.

**The 1991 amendment,** effective March 29, 1991, substituted "Department" for "Agency" in the catchline; substituted "department" for "agency" shall be organized within the health and environment department and" in the introductory phrase; and made a minor stylistic change in Subsection D.

**Environmental improvement division has primary jurisdiction over pollution control.** 1978 Op. Att'y Gen. No. 78-12.

Supreme court holds that action brought by attorney general and certain private citizens for injunction to abate alleged public nuisance caused by emissions from coal-burning power plant should have been dismissed in trial court since environmental improvement division has primary jurisdiction over pollution control and means are available to compel division to perform its duties, should it fail to do so. *State ex rel.*

*Norvell v. Arizona Pub. Serv. Co.*, 85 N.M. 165, 510 P.2d 98 (1973).

**But agency is not given all-encompassing power to abate nuisances.** *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

**Because that is within jurisdiction of courts.** — It readily falls within the traditional jurisdiction of the court to enjoin, abate or impose damages for creation of a nuisance. *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

**Nature of agency.** — The environmental improvement division is an environmental regulatory and enforcement agency in addition to being an environmental management agency. 1987 Op. Att'y Gen. No. 87-22.

**Article does not prohibit or limit environmental improvement division from obtaining injunctive relief.** *Environmental Imp. Div. v. Aguayo*, 99 N.M. 497, 660 P.2d 587 (1983).

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. —  
61A Am. Jur. 2d Pollution Control §§ 6, 134.

39A C.J.S. Health and Environment § 133.

### 74-1-7. Environmental improvement agency; duties.

A. The agency is responsible for environmental management and consumer protection programs. In that respect, the agency shall maintain, develop and enforce regulations and standards in the following areas:

- (1) food protection;
- (2) water supply, including regulations establishing a reasonable system of fees for the provision of services by the agency to public water supply systems, and water pollution as provided in the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978];
- (3) liquid waste;
- (4) air quality management as provided in the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978];
- (5) radiation control as provided in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978];
- (6) noise control;
- (7) nuisance abatement;
- (8) vector control;
- (9) occupational health and safety as provided in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978];
- (10) sanitation of public swimming pools and public baths;
- (11) plumbing, drainage, ventilation and sanitation of public buildings in the interest of public health;
- (12) medical radiation, health and safety certification and standards for radiologic technologists as provided in the Medical Radiation Health and Safety Act [61-14E-1 to 61-14E-12 NMSA 1978];
- (13) hazardous wastes and underground storage tanks as provided in the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978]; and
- (14) solid waste as provided in the Solid Waste Act.

B. Nothing in Subsection A of this section imposes requirements for the approval of subdivision plats in addition to those required elsewhere by law. Nothing in Subsection A of this section preempts the authority of any political subdivision to approve subdivision plats.

**History:** 1953 Comp., § 12-19-10, enacted by Laws 1971, ch. 277, § 10; recompiled as 1953 Comp., § 12-12-10 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 5; 1977, ch. 122, § 5; 1983, ch. 317, § 13; 1989, ch. 223, § 1; 1989, ch. 289, § 2; 1990, ch. 99, § 64.

**Cross references.** — For definition of "agency," see 74-1-3 NMSA 1978.

**Solid Waste Act.** — See 74-9-1 NMSA 1978 and notes thereto.

**Agency is not given all-encompassing power to abate nuisances.** *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

**Because that is within jurisdiction of courts.** — It readily falls within the traditional jurisdiction of the court to enjoin, abate or impose damages for creation of a nuisance. *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

**No authority to deputize local officials.** — The environmental improvement division (EID) may seek assistance from city and county law enforcement agencies to enforce asbestos disposal regulations pursuant to the Mutual Aid Act, 29-8-1 to 29-8-3 NMSA 1978, but it cannot deputize city or county law enforcement officials to act as EID agents to enforce the division's asbestos disposal regulations. 1987 Op. Att'y Gen. No. 87-48.

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For note, "State Control of Low-Level Nuclear Waste Disposal," see 17 Nat. Resources J. 683 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39A C.J.S. Health and Environment § 133.

### 74-1-8. Environmental improvement board; duties.

A. The board is responsible for environmental management and consumer protection. In that respect, the board shall promulgate regulations and standards in the following areas:

- (1) food protection;
- (2) water supply, including regulations establishing a reasonable system of fees for the provision of services by the agency to public water supply systems;



- (3) liquid waste;
- (4) air quality management as provided in the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978];
- (5) radiation control as provided in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978];
- (6) noise control;
- (7) nuisance abatement;
- (8) vector control;
- (9) occupational health and safety as provided in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978];
- (10) sanitation of public swimming pools and public baths;
- (11) plumbing, drainage, ventilation and sanitation of public buildings in the interest of public health;
- (12) medical radiation, health and safety certification and standards for radiologic technologists as provided in the Medical Radiation Health and Safety Act [61-14E-1 to 61-14E-12 NMSA 1978];
- (13) hazardous wastes and underground storage tanks as provided in the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978]; and
- (14) solid waste as provided in the Solid Waste Act.

B. Nothing in Subsection A of this section imposes requirements for the approval of subdivision plats in addition to those required elsewhere by law. Nothing in Subsection A of this section preempts the authority of any political subdivision to approve subdivision plats.

C. Fees collected pursuant to Paragraph (2) of Subsection A of this section shall be deposited in the water supply fund.

**History:** 1953 Comp., § 12-19-11, enacted by Laws 1971, ch. 277, § 11; recompiled as 1953 Comp., § 12-12-11 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 6; 1977, ch. 122, § 6; 1983, ch. 317, § 14; 1989, ch. 223, § 2; 1989, ch. 289, § 3; 1990, ch. 99, § 65; 1993, ch. 100, § 2.

The 1993 amendment, effective March 31, 1993, rewrote Subsection C which read "Effective July 1, 1992, all fees collected pursuant to Subsection A of this section shall be deposited in the general fund."

**Solid Waste Act.** — See 74-9-1 NMSA 1978 and notes thereto.

**Board has paramount environmental improvement authority.** — It is the intention of the legislature to give the environmental improvement board statewide, paramount authority to enforce regulations and standards in the various areas listed and that all other entities of government and political subdivisions thereof must conform. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Board promulgates regulations.** — There is no inconsistency or conflict between 3-48-2 NMSA 1978 and this section. The latter gives the board statewide responsibility for environmental management and protection, making the promulgation of regulations and standards by the board in the areas of liquid waste and solid waste sanitation and refuse disposal mandatory. The former merely gives municipalities the option or discretion to enact ordinances governing the collection and disposal of refuse. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**For liquid and solid waste and refuse.** — The phrase "solid waste sanitation," as used in Subsection A(3) is not limited or qualified by the phrase, "refuse disposal." "Liquid waste," "solid waste" and "refuse"

constitute three distinct categories of environmental concern. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Board's duty to prepare regulations.** — The environmental improvement board has a duty to have the regulations prepared by a staff of its own. It has no right to delegate this authority to one who is an "interested person" at a public hearing. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgment. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

**Board cannot act lawfully alone in adopting radiation regulations.** The board must obtain "the advice and consent" of the radiation technical advisory council before it can adopt regulations. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

**Liquid waste disposal regulations not vague.** — The revised liquid disposal regulations adopted pursuant to Subsection A(3) of this section are not facially vague. *Climax Chem. Co. v. New Mexico Env'tl. Imp. Bd.*, 106 N.M. 14, 738 P.2d 132 (Ct. App. 1987).

**Requirements of cleaning refuse transportation vehicle.** — Regulations adopted under this article requiring that any vehicle employed in collection or transportation of waste and refuse be cleaned at such times and in such manner as to prevent offensive odors and unsightliness are not constitutionally repugnant for vagueness. The question to be asked is: What might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition, and the answer is capable of common un-



derstanding. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Providing sound storage facilities.** — Regulations adopted pursuant to this article requiring that storage facilities shall be fly proof, rodent proof and leak proof are neither unconstitutionally vague nor impossible of accomplishment. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Registering prior to modification of solid waste disposal system.** — Regulation adopted pursuant to this article which provides that prior to the creation or modification of a system for the collection, transportation or disposal of solid waste the person who is operating or will operate the system shall obtain a registration certificate from the board, where "modification" is defined as any significant change in the physical characteristics or method of operation of a system for the collection, transportation or disposal of solid waste, is not unconstitutionally vague. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Adequate fire prevention at sanitary landfill sites.** — Requirements of "adequate" means to prevent and extinguish fires at sanitary landfill sites and requirements of one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3,000 and one or more sanitary landfills or other disposal facilities, not excluding modified landfills, for populations under 3,000 and for disposal of waste collected from parks, recreational areas and highway rest areas, "as necessary," found in regulations adopted under this article, are not unconstitutionally vague. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Traditional jurisdiction of courts to enjoin or abate nuisances.** — It readily falls within the traditional jurisdiction of the court to enjoin, abate or impose damages for creation of a nuisance. *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39A C.J.S. Health and Environment § 133.

### 74-1-8.1. Legal advice.

A. In the exercise of any of its powers or duties, the board shall act with independent legal advice. The manner in which such advice is provided shall be determined by the board, but from among one of the following:

- (1) the office of the attorney general;
- (2) independent counsel hired by the board, whether full- or part-time; or
- (3) another state agency whose function is sufficiently distinct from the department of environment to assure independent, impartial advice.

B. Notwithstanding the provisions of Subsection A of this section, attorneys from the agency may act for the board in lawsuits filed against or on behalf of the board, and the attorney general may, at the request of the board, file and defend lawsuits on behalf of the board.

**History:** 1978 Comp., § 74-1-8.1, enacted by Laws 1982, ch. 73, § 23; 1991, ch. 25, § 31.

The 1991 amendment, effective March 29, 1991, in Subsection A, substituted "department of environ-

ment" for "health and environment department" in Paragraph (3) and made a minor stylistic change in the second sentence.

### 74-1-8.2. Recompiled.

**Recompilations.** — Laws 1993, ch. 291, § 18 recompiles 74-1-8.2 NMSA 1978, as amended by Laws 1991, ch. 25, § 32, relating to legal advice for the

water quality control commission as 74-6-3.1 NMSA 1978, effective June 18, 1993.

### 74-1-8.3. Water supply fund created.

The "water supply fund" is created in the state treasury to be administered by the department of environment. All fees collected pursuant to the provisions of Paragraph (2) of Subsection A of Section 74-1-8 NMSA 1978 shall be deposited in the fund. Money in the fund is appropriated to the department of environment for the purpose of paying the costs of administering water supply regulations.

**History:** Laws 1993, ch. 100, § 6.

**Emergency clauses.** — Laws 1993, ch. 100, § 8

makes the act effective immediately. Approved March 31, 1993.



**74-1-9. Adoption of regulations; notice and hearing; appeal.**

A. Any person may recommend or propose regulations to the board for promulgation. The board shall determine whether or not to hold a hearing within sixty days of submission of a proposed regulation.

B. No regulation shall be adopted until after a public hearing by the board. As used in this section, "regulation" includes any amendment or repeal thereof. Hearings on regulations of nonstatewide application shall be held within that area which is substantially affected by the regulation. Hearings on regulations of statewide application may be held at Santa Fe or within any area of the state substantially affected by the regulation. In making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

(1) character and degree of injury to or interference with health, welfare, animal and plant life, property and the environment;

(2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and

(3) technical practicability, necessity for and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation.

C. The standards for regulations set forth in Subsection A [Subsection B] of this section do not apply to the promulgation of regulations under the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978]; or any other act in which specific standards are set forth for the board's consideration.

D. Notice of the hearing shall be given at least sixty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The proposed language amending any existing regulation or any proposed new regulation shall be made available to the public as of the date the notice of the hearing is given. The notice shall also state where interested persons may secure copies of any proposed amendment or new regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings.

E. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, proposed changes to the proposed regulation, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the board.

F. The board may designate a hearing officer to take evidence in the hearing. A transcript shall be made of the entire hearing proceedings.

G. No regulation or amendment or repeal thereof adopted by the board shall become effective until thirty days after its filing under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

H. Any person who is or may be affected by a regulation adopted by the board may appeal to the court of appeals for further relief. All such appeals shall be upon the transcript made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation under the State Rules Act.

I. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy attached to the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the board for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the board.

J. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the transcript; or



## (3) otherwise not in accordance with law.

**History:** 1953 Comp., § 12-19-13, enacted by Laws 1971, ch. 277, § 13; recompiled as 1953 Comp., § 12-12-13, by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 7; 1974, ch. 64, § 1; 1982, ch. 73, § 24; 1985, ch. 17, § 1.

**Cross references.** — For notice by publication, see 14-11-1 NMSA 1978 et seq.

**Bracketed material.** — The bracketed reference to "Subsection B" in Subsection C was inserted by the compiler as that appears to be the intended reference. The bracketed insertion was not enacted by the legislature and is not part of the law.

**Board's duty to prepare regulations.** — The environmental improvement board has a duty to have the regulations prepared by a staff of its own. It has no right to delegate this authority to one who is an "interested person" at a public hearing. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

**Rules and regulations for radiation protection.** — The environmental improvement board is authorized to promulgate rules and regulations for radiation protection without the radiation technical advisory council approving the terms of such rules and regulations, if the board promulgates regulations pursuant to the Medical Radiation Health and Safety Act (61-14E-1 NMSA 1978 et seq.); but the board may not do so without the council's approval if the regulations are promulgated pursuant to the Radiation Protection Act (74-3-1 NMSA 1978 et seq.). 1988 Op. Att'y Gen. No. 88-39.

**Board not authorized to plan industrial development.** — There is nothing in the board's mandate that gives it the authority to plan for the industrial development of any area in the state; although the standards and regulations promulgated by the board will have an impact on the industrial development of the area, such an impact should be as a consequence, not by design. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Board not authorized to set standards more restrictive than federal regulations.** — There is no authority given to the board to promulgate regulations more restrictive than those under federal law in order for New Mexico to regain control over its air. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Substantial evidence required basis of administrative regulations.** — An administrative board in making its determinations may give greater credence to some evidence rather than to some other, and it is not a court's function to substitute its opinion for that of the administrative board, but this is in situations where there is a difference or a conflict in the evidence, not a complete absence of evidence. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

There is no substantial evidence in the record to support one of the board's final reasons for adopting amended regulations as to sulfur dioxide emissions, namely, because of their effects on visibility, since by definition sulfur dioxide in a gaseous form is a heavy colorless nonflammable gas of pungent suffocating odor, and whether sulfur dioxide emissions can or do combine with other elements in the atmosphere to produce a visible gas, or whatever, is not shown in the record. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Formal findings not required.** — In adopting regulations, administrative agencies must give some indication of their reasoning and of the basis upon

which the regulations are adopted in order for the courts to be able to perform their reviewing function, but formal findings in a judicial sense are not required, and where each of 12 reasons listed for adopting regulations is based upon evidence and testimony accumulated at several hearings, it is held that the environmental improvement board has given sufficient indication of its reasoning and of the basis upon which it adopts its regulations. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Board bound by its standards.** — The board, in promulgating an ambient air quality standard, establishes the criterion for determining what concentration or quantity of sulfur dioxide in the specified time periods constitutes air pollution; it makes the judgment that concentrations over the quantity prescribed would injure health, interfere with visibility and adversely affect the public welfare. Having set the standard, it is bound by it, the same as anyone else. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Modification authorized to explain standard and to prevent pollution.** — The board has the continuing authority to change the ambient air quality standard for sulfur dioxide after proper notice and hearing and to adopt regulations to implement or explain it, but it may not set a new standard or adopt regulations implementing or explaining it for any reason other than to prevent or abate air pollution. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Adequate notice of hearing.** — Notice of meeting at which regulations are to be adopted mailed to numerous individuals, committees and organizations, and issued in a news release stating time, place and purpose of meeting and published in two newspapers is adequate. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**No hearing on minor corrections to regulation.** — This section does not require the board to provide public notice and a hearing merely to make minor, nonsubstantive corrections to regulations after hearing but prior to filing. 1987 Op. Att'y Gen. No. 87-59.

**Failure to preserve an error at a public hearing** does not defeat a person's right to appeal the validity of a regulation adopted at that hearing. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

**Relief for a lay person is justified in an appeal,** notwithstanding the failure to raise legal or factual issues at the public hearing. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

When a board adopts a regulation, which, when applied, leads to an unfavorable result to any "person," that "person" can appeal to the court of appeals to challenge the validity of the regulation. This "person" may be an ordinary lay person, unlearned in the law and procedural process. *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

**Company's right to appeal liquid waste disposal regulations.** — Section 74-1-9H NMSA 1978 gives any person who is or may be affected by a regulation adopted by the environmental improvement board a right of appeal to the court of appeals, and a company is such a person where it maintains



two septic systems, each with capacities within the reach of the liquid waste disposal regulations adopted pursuant to 74-1-8A(3) NMSA 1978. Climax Chem. Co. v. New Mexico Env'tl. Imp. Bd., 106 N.M. 14, 738 P.2d 132 (Ct. App. 1987).

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New

Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 6, 134.

39A C.J.S. Health and Environment §§ 138, 142, 145.

## 74-1-10. Penalty.

A person who violates any regulation of the board is guilty of a petty misdemeanor. This section does not apply to any regulation for which a criminal penalty is otherwise provided by law.

**History:** 1953 Comp., § 12-12-14, enacted by Laws 1973, ch. 340, § 8.

**Cross references.** — As to sentencing for petty misdemeanors, see 31-19-1 NMSA 1978.

**Requirements of cleaning refuse transportation vehicle.** — Regulations adopted under this article requiring that any vehicle employed in collection or transportation of waste and refuse be cleaned at such times and in such manner as to prevent offensive odors and unsightliness are not constitutionally repugnant for vagueness. The question to be asked is: What might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition, and the answer is capable of common understanding. New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Providing sound storage facilities.** — Regulations adopted pursuant to this article requiring that storage facilities shall be fly proof, rodent proof and leak proof are neither unconstitutionally vague nor impossible of accomplishment. New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Registering prior to modification of solid waste disposal system.** — Regulation adopted pursuant to this article which provides that prior to the creation or modification of a system for the collection, transportation or disposal of solid waste the person who is

operating or will operate the system shall obtain a registration certificate from the division, where "modification" is defined as any significant change in the physical characteristics or method of operation of a system for the collection, transportation or disposal of solid waste, is not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Adequate fire prevention at sanitary landfill sites.** — Requirements of "adequate" means to prevent and extinguish fires at sanitary landfill sites and of one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3,000 and one or more sanitary landfills or other disposal facilities, not excluding modified landfills, for populations under 3,000 and for disposal of waste collected from parks, recreational areas and highway rest areas, "as necessary," found in regulations adopted under this article, are not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 590 to 602.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 A.L.R.3d 1258.

39A C.J.S. Health and Environment § 139.

## 74-1-11. Repealed.

**Repeals.** — Laws 1989, ch. 223, § 4 repeals 74-1-11 NMSA 1978, as enacted by Laws 1989, ch. 223, § 3, relating to creation of the water supply fund, effective

July 1, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

## 74-1-12. Compliance with the federal Safe Drinking Water Act; purpose.

The purpose of this act is to provide:

- A. an incentive for conservation of water, the state's most precious resource; and
- B. funding for certain locations in the state to comply with the federal Safe Drinking Water Act in which the United States congress mandated that the United States environmental protection agency establish drinking water standards for eighty-three contaminants, require filtration and disinfection for all public water supply systems, increase enforcement authority, establish public notification requirements, implement a lead ban and add drinking water standards for twenty-five contaminants every three years.



**ATTACHMENT IV-2**

**Air Quality Control Act  
NMSA 1978, §§ 74-2-1 to 74-2-17 (Repl. Pamp. 1993)**





## ARTICLE 2

### Air Pollution

Sec.

- 74-2-1. Short title.
- 74-2-2. Definitions.
- 74-2-3. Environmental improvement board.
- 74-2-4. Local authority.
- 74-2-5. Duties and powers; environmental improvement board; local board.
- 74-2-5.1. Duties and powers of the department and the local agency.
- 74-2-5.2. State air pollution control agency; specific duties and powers of the department.
- 74-2-6. Adoption of regulations; notice and hearings.
- 74-2-7. Permits; permit appeals to the environmental improvement board or the local board; permit fees.
- 74-2-8. Variances.
- 74-2-9. Judicial review; administrative actions.
- 74-2-10. Emergency powers of the secretary and the director.

Sec.

- 74-2-11. Confidential information.
- 74-2-11.1. Limitations on regulations.
- 74-2-12. Enforcement; compliance orders; field citations.
- 74-2-12.1. Civil penalty; representation of department or local authority.
- 74-2-13. Inspection.
- 74-2-14. Criminal penalties.
- 74-2-15. State air quality permit fund.
- 74-2-15.1. Repealed.
- 74-2-16. Municipal or county air quality permit fund.
- 74-2-17. Continuing effect of existing laws, rules and regulations.
- 74-2-18 to 74-2-22. Repealed.

#### 74-2-1. Short title.

Chapter 74, Article 2 NMSA 1978 may be cited as the "Air Quality Control Act".

**History:** 1953 Comp., § 12-14-1, enacted by Laws 1967, ch. 277, § 1; 1972, ch. 51, § 1; 1989, ch. 278, § 1.

**Cross references.** — For the Environmental Improvement Act, see 74-1-1 to 74-1-10 NMSA 1978. For the Pollution Control Revenue Bond Act, see 3-59-1 to 3-59-14 NMSA 1978.

**Comparison to Federal Clean Air Act.** — New Mexico's Air Quality Control Act is not generally more stringent than the Federal Clean Air Act except in areas of air pollution prevention not preempted by the Federal Clean Air Act and not precluded by the limiting provisions in the Air Quality Control Act. 1987 Op. Att'y Gen. No. 87-11.

**Application of state antipollution laws to industries located on Indian land is valid,** provided that the operation of those laws neither impairs the proprietary interest of the Indian people in their lands nor limits the right of the tribe or pueblo to govern matters of tribal relations. The regulation of industrial discharges is not a matter fundamental to tribal relations, and the state supervision of environmental pollution will not limit, in any meaningful manner, the right of the several Indian peoples to govern themselves. The extension of pollution controls to industries located on Indian land will not affect the ownership or control of the land. 1970 Op. Att'y Gen. No. 70-5.

**Law reviews.** — For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

For note, "The 1977 Procedural Amendments to the Clean Air Act — Have They Made a Difference?," see 24 Nat. Resources J. 745 (1984).

For note, "Judicial Review of Environmental Protection Agency Rule Promulgation — Clean Air Act State Implementation Plan Requirement — New Mexico EID v. Thomas, 789 F.2d 825 (10th Cir. 1986)," see 27 Nat. Resources J. 723 (1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control § 55 et seq.

Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

Control of interstate pollution under Clean Air Act as amended in 1977 (42 USCS §§ 7401-7626), 82 A.L.R. Fed. 316.

Application of air quality modeling to decisionmaking under Clean Air Act (42 USCS §§ 7401-7426), 84 A.L.R. Fed. 710.

Standing of air pollution source to challenge Clean Air Act (42 USCS §§ 7401-7626) or its implementation, 85 A.L.R. Fed. 515.

Construction and application of § 307(b)(1) of Clean Air Act (42 USCS § 7607(b)(1)) pertaining to judicial review by courts of appeals, 86 A.L.R. Fed. 604.

What constitutes modification of stationary source, under § 111 (a)(3), (4) of Clean Air Act (42 USCS § 7411 (a)(3), (4)), so as to subject source to Environmental Protection Agency's new source performance standards, 94 A.L.R. Fed. 750.

39A C.J.S. Health and Environment § 130.

#### 74-2-2. Definitions.

As used in the Air Quality Control Act [this article]:

A. "air contaminant" means any substance, including but not limited to any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof;

B. "air pollution" means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property;

C. "department" means the department of environment;

D. "director" means the administrative head of a local agency;

E. "emission limitation" and "emission standard" mean a requirement established by the environmental improvement board or the local board, the department, the local authority or the local agency or pursuant to the federal act that limits the quantity, rate or concentration, or combination thereof, of emissions of air contaminants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction;

F. "federal act" means the federal Clean Air Act, its subsequent amendments and successor provisions;

G. "federal standard of performance" means any standard of performance, emission limitation or emission standard adopted pursuant to 42 U.S.C. Section 7411 or 7412;

H. "hazardous air pollutant" means an air contaminant that has been classified as a hazardous air pollutant pursuant to the federal act;

I. "local agency" means the administrative agency established by a local authority pursuant to Paragraph (2) of Subsection A of Section 74-2-4 NMSA 1978;

J. "local authority" means any of the following political subdivisions of the state that have, by following the procedure set forth in Subsection A of Section 74-2-4 NMSA 1978, assumed jurisdiction for local administration and enforcement of the Air Quality Control Act:

(1) a county that was a class A county as of January 1, 1980; or

(2) a municipality with a population greater than one hundred thousand located within a county that was a class A county as of January 1, 1980;

K. "local board" means a municipal, county or joint air quality control board created by any local authority;

L. "mandatory class I area" means any of the following areas in this state that were in existence on August 7, 1977:

(1) national wilderness areas that exceed five thousand acres in size; and

(2) national parks that exceed six thousand acres in size;

M. "modification" means any physical change in, or change in the method of operation of, a source that results in an increase in the potential emission rate of any regulated air contaminant emitted by the source or that results in the emission of any regulated air contaminant not previously emitted, but does not include:

(1) a change in ownership of the source;

(2) routine maintenance, repair or replacement;

(3) installation of air pollution control equipment, and all related process equipment and materials necessary for its operation, undertaken for the purpose of complying with regulations adopted by the environmental improvement board or the local board or pursuant to the federal act; or

(4) unless previously limited by enforceable permit conditions:

(a) an increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(b) an increase in the hours of operation; or

(c) use of an alternative fuel or raw material if, prior to January 6, 1975, the source was capable of accommodating such fuel or raw material, or if use of an alternate fuel or raw material is caused by any natural gas curtailment or emergency allocation or any other lack of supply of natural gas;

N. "nonattainment area" means for any air contaminant an area that is designated "nonattainment" with respect to that contaminant within the meaning of Section 107(d) of the federal act;



O. "person" includes an individual, partnership, corporation, association, the state or political subdivision of the state and any agency, department or instrumentality of the United States and any of their officers, agents or employees;

P. "potential emission rate" means the emission rate of a source at its maximum capacity in the absence of air pollution control equipment that is not vital to production of the normal product of the source or to its normal operation;

Q. "regulated air contaminant" means any air contaminant, the emission or ambient concentration of which is regulated pursuant to the Air Quality Control Act or the federal act;

R. "secretary" means the secretary of environment;

S. "significant deterioration" means any increase in the ambient concentrations of any air contaminant above the levels allowed by the federal act or federal regulations for that air contaminant in the area within which the increase occurs;

T. "source" means any structure, building, equipment, facility, installation or operation that emits or may emit any air contaminant;

U. "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to operation or maintenance of a source to assure continuous emission reduction;

V. "state implementation plan" means any plan submitted by New Mexico to the federal environmental protection agency pursuant to 42 U.S.C. Section 7410; and

W. "toxic air pollutant" means any air contaminant, except a hazardous air pollutant, classified by the environmental improvement board or the local board as a toxic air pollutant.

**History:** 1953 Comp., § 12-14-2, enacted by Laws 1967, ch. 277, § 2; 1970, ch. 58, § 1; 1971, ch. 277, § 20; 1972, ch. 51, § 2; 1973, ch. 322, § 1; 1977, ch. 253, § 36; 1979, ch. 393, § 1; 1981, ch. 373, § 1; 1983, ch. 34, § 1; 1989, ch. 278, § 2; 1992, ch. 20, § 1.

**Cross references.** — For the definition of "class A county," see 4-44-1 NMSA 1978.

The 1992 amendment, effective March 5, 1992, deleted former Subsections C and D, defining "board" and "delayed compliance order"; rewrote former Subsection E and redesignated it as present Subsection C; redesignated former Subsection F as present Subsection D, while substituting therein "a local agency" for "the department"; redesignated former Subsection G as present Subsection E, while inserting therein "environmental improvement board or the local" and "the local authority or the local agency"; deleted former Subsection H, defining "environmental improvement division"; rewrote former Subsection I and redesignated it as present Subsection F; redesignated former Subsections J and K as present Subsections G and H; added present Subsections I, J and K; inserted "environmental improvement board or the local" in Subsection M(3); rewrote Subsection N; added present Subsection R; redesignated former Subsections R through U as present Subsections S through V; added Subsection W; and made minor stylistic changes throughout the section.

**Clean Air Act.** — The federal Clean Air Act, referred to in this section appears as 42 U.S.C. § 7401 et seq. Section 107(d) of that act, referred to in Subsection N, appears as 42 U.S.C. § 7407.

**Board may not expand definition of "air pollution"** from "reasonable probability" of injury to health to a mere showing that condition "tends to cause harm." *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 101 N.M. 291, 681 P.2d 717 (1984).

**Air Quality Standards' margin of safety** does not contemplate excursions beyond legal limits. — Petitioner's argument that Congress, by allowing

an adequate margin of safety, not only contemplated but countenanced occasional excursions beyond the limits of the National Ambient Air Quality Standards is meritless since it is clear that the margin of safety protects against effects which have not yet been uncovered by research or whose medical significance is a matter of disagreement. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

**Board may rely on division's modeling results to deny variance application.** — The environmental improvement board may rely on the environmental improvement division's modeling results, showing particulate concentrations in excess of the legal limit, in arriving at its decision to deny a lumber company's application for a variance from air quality control regulations. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

**Public nuisance laws deemed alternative means of enforcement.** — Where air quality standards or regulations have not been established as to what constitutes "air pollution" and thus no violation of this article or regulations and standards is apparent, New Mexico's public nuisance law may provide an alternative means for the environmental improvement division to abate noxious odors. 1978 Op. Att'y Gen. No. 78-12.

**Law reviews.** — For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).



### 74-2-3. Environmental improvement board.

A. In taking any action under the Air Quality Control Act [this article], a majority of the environmental improvement board constitutes a quorum, but any action, order or decision of the environmental improvement board requires the concurrence of three members present at a meeting.

B. Except as provided in the Air Quality Control Act, the jurisdiction of the environmental improvement board extends to all areas of the state except within the boundaries of a local authority.

**History:** 1953 Comp., § 12-14-3, enacted by Laws 1967, ch. 277, § 3; 1970, ch. 58, § 2; 1971, ch. 277, § 21; 1973, ch. 322, § 2; 1992, ch. 20, § 2.

**Cross references.** — As to definition of "board," "department" and "director," see 74-2-2 NMSA 1978. As to definition of "A class county," see 4-44-1 NMSA 1978. As to exemption of environmental improvement board from authority of secretary of environment, see 9-7A-12 NMSA 1978.

**The 1992 amendment,** effective March 5, 1992, substituted the present section catchline for "State air pollution control agency"; deleted the former first sentence of Subsection A, defining the environmental improvement board; rewrote the former second paragraph of Subsection A and designated it as present Subsection B; and deleted former Subsection B, relating to duties of the director of the department.

**Air pollution controlled by subjecting entire state to regulatory authority.** — Under this article, air pollution throughout the state is controlled by subjecting every area of the state to the regulatory authority of some board: either the environmental improvement board or a board created in accordance with 74-2-4 NMSA 1978. 1982 Op. Att'y Gen. No. 82-7.

**Responsibility for enforcing act.** — Enforcement of New Mexico regulations and standards more stringent than, or in addition to, the federal standards and regulations is the state's responsibility; the environ-

mental improvement board has state-wide responsibility for enforcing this article, but the Albuquerque-Bernalillo county air quality control board has this responsibility in the Albuquerque-Bernalillo county area. 1987 Op. Att'y Gen. No. 87-11.

**Requiring use of oxygenated fuels.** — The environmental improvement board and/or the Albuquerque-Bernalillo county air quality control board may require the use of oxygenated fuels without violating the constitutional prohibition against interference with interstate commerce, but may only do so if that requirement is contained in the state's implementation plan. 1987 Op. Att'y Gen. No. 87-11.

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control § 51 et seq.

Orders or penalties against state or its officials for failure to comply with regulations directing state to regulate pollution-creating activities of private parties, under § 113 of Clean Air Act (42 U.S.C.S. § 1857c-8), 31 A.L.R. Fed. 79.

39A C.J.S. Health and Environment § 130.

### 74-2-4. Local authority.

A. A county or municipality meeting the qualifications set forth in Paragraph (1) or (2) of Subsection J of Section 74-2-2 NMSA 1978 may assume jurisdiction as a local authority by adopting an ordinance providing for the local administration and enforcement of the Air Quality Control Act [this article]. The ordinance shall:

(1) create a local board to perform, within the boundaries of the local authority, those functions delegated to the environmental improvement board under the Air Quality Control Act, except any functions reserved exclusively for the environmental improvement board;

(2) create a local agency to administer and enforce the provisions of the Air Quality Control Act within the boundaries of the local authority that shall, within the boundaries of the local authority, perform all of the duties required of the department and exert all of the powers granted to the department except for those duties and powers reserved exclusively for the department; and

(3) provide for the appointment of a director who shall perform for the local authority the same duties as required of the secretary under the Air Quality Control Act, except the duties and powers reserved exclusively for the secretary.

B. At least a majority of the members of a local board shall be individuals who represent the public interest and do not derive any significant portion of their income from persons subject to or who appear before the local board on issues related to the federal act or the Air Quality Control Act.

C. Prior to adopting any ordinance regulating air pollution, public hearings and consultations shall be held as directed by the local authority adopting the ordinance. The



provisions of any ordinance shall be consistent with the substantive provisions of the Air Quality Control Act and shall provide for standards and regulations not lower than those required by regulations adopted by the environmental improvement board.

D. Notwithstanding the provisions of Subsection A of this section, the environmental improvement board and the secretary shall retain jurisdiction and control for the administration and enforcement of the Air Quality Control Act as determined in that act with respect to any act or failure to act, governmental or proprietary, of any local authority that causes or contributes to air pollution, including proceeding against a local authority as provided in Section 74-2-12 NMSA 1978. "Failure to act", as used in this section, includes failure to act against any person violating the applicable ordinance or regulation adopted pursuant thereto.

E. Any local authority that is located within a transportation-related pollutant nonattainment area may provide for a vehicle emission inspection and maintenance program for vehicles under twenty-six thousand pounds gross vehicle weight powered by a spark-ignited internal combustion engine, which program shall be no more stringent than that required under the federal act or under federal air quality standards. Any two or more local authorities may adopt identical rules and regulations necessary to implement the vehicle emission inspection and maintenance program, including examining the alternatives of public or private operation of the program.

F. Any local authority that has implemented a vehicle emission inspection and maintenance program may extend the enforcement of that program by entering into joint powers agreements with any contiguous municipality or county within the designated airshed or with the department.

G. No tax shall be imposed to fund any vehicle emission inspection and maintenance program until the local authority has submitted the question of imposition of a tax to the registered voters of the local authority and those registered voters have approved the imposition of the tax.

H. No vehicle emission inspection fee may be imposed by a local authority that exceeds two dollars (\$2.00) for each vehicle subject to an emission inspection and maintenance program. The above fee limitation shall not limit any charges for vehicle inspections by a private vehicle emission inspection and maintenance station.

I. A local authority having a vehicle emission inspection and maintenance program is authorized to adopt rules, regulations and guidelines governing the establishment of private vehicle emission inspection and maintenance stations. No private vehicle emission inspection and maintenance station shall test vehicles unless the station possesses a valid permit issued by the local agency. Permit fees shall be determined by ordinance of the local authority and shall not exceed two hundred dollars (\$200) per year per station. Additionally, a local authority may charge a permit fee of up to thirty-five dollars (\$35.00) per year for each vehicle emissions mechanic and for each vehicle emissions inspector. The imposition of permit fees does not require a vote of the registered voters of the local authority.

**History:** 1953 Comp., § 12-14-4, enacted by Laws 1967, ch. 277, § 4; 1970, ch. 58, § 3; 1971, ch. 277, § 22; 1973, ch. 322, § 3; 1981, ch. 373, § 2; 1985, ch. 95, § 1; 1988, ch. 128, § 1; 1989, ch. 278, § 3; 1990, ch. 31, § 2; 1992, ch. 20, § 3.

**Cross references.** — For definition of "class A county", see 4-44-1 NMSA 1978.

**The 1992 amendment,** effective March 5, 1992, rewrote this section to the extent that a detailed comparison would be impracticable.

**Meaning of "federal act".** — See Paragraph F of 74-2-2 NMSA 1978 and notes thereto.

**Air pollution controlled by subjecting entire state to regulatory authority.** — Under this article, air pollution throughout the state is controlled by subjecting every area of the state to the regulatory authority of some board: either the environmental

improvement board or a board created in accordance with this section. 1982 Op. Att'y Gen. No. 82-7.

**Municipality not exempt from regulations adopted by county board.** — Section 4-37-2 NMSA 1978 does not exempt a municipality from regulations adopted by a county air quality control board which has the authority to adopt regulations to prevent or abate air pollution within the geographic boundaries of that county. 1982 Op. Att'y Gen. No. 82-7.

**Localities may impose criminal penalties for violations of act.** — This article does not expressly deny to counties and municipalities the power to impose criminal penalties for violations of the act, thus such penalties are valid under N.M. Const., art. X, § 6. *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S.Ct. 345, 88 L. Ed. 2d 292 (1985).



Am. Jur. 2d, A.L.R. and C.J.S. references. —  
 61A Am. Jur. 2d Pollution Control § 51 et seq.  
 What are "land-use and transportation controls"  
 which may be imposed, under § 100(a)(2)(B) of Clean

Air Act of 1970 (42 U.S.C.S. § 7405), to insure main-  
 tenance of national primary ambient air quality stan-  
 dards, 30 A.L.R. Fed. 156.  
 39A C.J.S. Health and Environment § 130.

## 74-2-5. Duties and powers; environmental improvement board; local board.

A. The environmental improvement board or the local board shall prevent or abate air pollution.

B. The environmental improvement board or the local board shall:

(1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act [this article] to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction, or any part thereof; and

(2) adopt a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction or any part thereof.

C. Regulations adopted by the environmental improvement board or the local board may:

(1) include regulations to protect visibility in mandatory class I areas to prevent significant deterioration of air quality and to achieve national ambient air quality standards in nonattainment areas; provided that such regulations:

(a) shall be no more stringent than but at least as stringent as required by the federal act and federal regulations pertaining to visibility protection in mandatory class I areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas; and

(b) shall be applicable only to sources subject to such regulation pursuant to the federal act;

(2) prescribe standards of performance for sources and emission standards for hazardous air pollutants that, except as provided in Paragraph (3) of this subsection:

(a) shall be no more stringent than but at least as stringent as required by federal standards of performance; and

(b) shall be applicable only to sources subject to such federal standards of performance;

(3) include regulations governing emissions from solid waste incinerators that shall be at least as stringent as, and may be more stringent than, any applicable federal emission limitations;

(4) require notice to the department or the local agency of the intent to introduce or permit the introduction of an air contaminant into the air within the geographical area of the environmental improvement board's jurisdiction or the local board's jurisdiction; and

(5) require any person emitting any air contaminant to:

(a) install, use and maintain emission monitoring devices;

(b) sample emissions in accordance with methods and at locations and intervals as may be prescribed by the environmental improvement board or the local board;

(c) establish and maintain records of the nature and amount of emissions;

(d) submit reports regarding the nature and amounts of emissions and the performance of emission control devices; and

(e) provide any other reasonable information relating to the emission of air contaminants.

D. Any regulation adopted under this section shall be consistent with federal law, if any, relating to control of motor vehicle emission.

E. In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:



- (1) character and degree of injury to or interference with health, welfare, visibility and property;
- (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
- (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

**History:** 1953 Comp., § 12-14-5, enacted by Laws 1967, ch. 277, § 5; 1970, ch. 58, § 4; 1972, ch. 51, § 3; 1979, ch. 393, § 2; 1981, ch. 373, § 3; 1983, ch. 34, § 2; 1987, ch. 293, § 1; 1990, ch. 99, § 66; 1992, ch. 20, § 4.

**Cross references.** — For definitions of "board" and "federal act," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992, substituted the present section catchline for "Duties and powers of board"; inserted "environmental improvement board" in Subsection A, rewrote the provisions of former Subsection B and redesignated them as present Subsections B, C, and D; and deleted former Subsections C, D, and E, relating to notice of intent to introduce air contaminants, compacts with other states, and installation of monitoring devices, samples, records, and reports respectively.

**Meaning of "federal act".** — See Paragraph F of 74-2-2 NMSA 1978 and notes thereto.

**Responsibility for enforcing act.** — Enforcement of New Mexico regulations and standards more stringent than, or in addition to, the federal standards and regulations is the state's responsibility; the environmental improvement board has state-wide responsibility for enforcing this article, but the Albuquerque-Bernalillo county air quality control board has this responsibility in the Albuquerque-Bernalillo county area. 1987 Op. Att'y Gen. No. 87-11.

**Board's authority limited to pollution control.** — Administrative bodies are the creatures of statutes, and as such they have no common-law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them. The legislative mandate under this article is that the board should prevent or abate air pollution, and although the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy, such an approach to construction does not warrant allowing an administrative agency to amend or enlarge its authority under the guise of making rules and regulations. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**No authority to plan industrial development.** — There is nothing in the board's mandate that gives it the authority to plan for the industrial development of any area in the state; although the standards and regulations promulgated by the board will have an impact on the industrial development of the area, such an impact should be as a consequence, not by design. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**No authority to require more restrictive standards than federal regulations.** — There is no authority given to the board to promulgate regulations more restrictive than those under federal law in order for New Mexico to regain control over its air. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Requiring use of oxygenated fuels.** — The environmental improvement board and/or the Albuquerque-Bernalillo county air quality control board may

require the use of oxygenated fuels without violating the constitutional prohibition against interference with interstate commerce, but may only do so if that requirement is contained in the state's implementation plan. 1987 Op. Att'y Gen. No. 87-11.

**Board's regulation following federal requirements not automatically illegal.** — The board's adoption of a regulation which adheres to federal requirements does not create the automatic conclusion that it has ignored its obligations under state law. *Kennecott Copper Corp. v. New Mexico Env'tl. Imp. Bd.*, 94 N.M. 610, 614 P.2d 22 (Ct. App. 1980).

**Substantial evidence required to support regulations.** — There is no substantial evidence in the record to support one of the board's final reasons for adopting amended regulations as to sulfur dioxide emissions, namely, because of their effects on visibility, since by definition sulfur dioxide in a gaseous form is a heavy colorless nonflammable gas of pungent suffocating odor, and whether sulfur dioxide emissions can or do combine with other elements in the atmosphere to produce a visible gas, or whatever, is not shown in the record. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**But not required for every particular.** — Regulations adopted by a board, pursuant to this section after substantial compliance with the public hearing requirements, need not be supported by substantial evidence in every material portion thereof. *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

**Board bound by its standard.** — The board, in promulgating an ambient air quality standard, establishes the criterion for determining what concentration or quantity of sulfur dioxide in the specified time periods constitutes air pollution; it makes the judgment that concentrations over the quantity prescribed would injure health, interfere with visibility and adversely affect the public welfare. Having set the standard, it is bound by it, the same as anyone else. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Modification authorized to prevent pollution.** — The board has the continuing authority to change the ambient air quality standard for sulfur dioxide after proper notice and hearing and to adopt regulations to implement or explain it, but it may not set a new standard or adopt regulations implementing or explaining it for any reason other than to prevent or abate air pollution. *Public Serv. Co. v. New Mexico Env'tl. Imp. Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

**Upon showing of present or future need for new standard.** — New emission regulations may be adopted by the board if there is substantial evidence in the record of a present or reasonably anticipated future need for a stricter regulation in order to prevent air pollution in excess of the standard. Thus, if the board can demonstrate that reasonably anticipated future growth in the area will, as a factual matter, result in pollution emissions which exceed



present ambient air standards, the board may enact stricter regulations for both existing and proposed sources. The board may act to prevent or abate air pollution when presented with persuasive evidence that emission sources are growing in number and that the totality of new and existing emissions will, if left at presently regulated rates, exceed the ambient air quality standard. 1977 Op. Att'y Gen. No. 77-15.

**Board obligated to amend standards to comply with federal requirements.** — When New Mexico standards are amended and thus made more stringent in order to comply with federal requirements, the board is doing no more than it is obliged to do by its mandate under the federal Clean Air Act. *Kennecott Copper Corp. v. New Mexico Envtl. Imp. Bd.*, 94 N.M. 610, 614 P.2d 22 (Ct. App. 1980).

**Law reviews.** — For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 51, 52, 55 et seq.

Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.

Air pollution control: validity of legislation permitting administrative agency to fix permissible standards of pollutant emission, 48 A.L.R.3d 326.

Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.

Construction and application of preemption sections (§§ 208, 210(c)(4)) of Clean Air Act (42 U.S.C.S. §§ 1857f-6a, 1857f-6c(c)(4)), 18 A.L.R. Fed. 971.

What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.

Construction, applicability and effect of § 304 of Clean Air Amendments of 1970 (42 U.S.C.S. § 1857h-2) in actions against alleged violators, 37 A.L.R. Fed. 320.

Clean Air Act implementation plans for nonattainment areas, 90 A.L.R. Fed. 481.

39A C.J.S. Health and Environment § 130.

### 74-2-5.1. Duties and powers of the department and the local agency.

The department and the local agency for their respective jurisdictions shall:

A. develop facts and make investigations and studies consistent with the Air Quality Control Act [this article] and, as required for enforcement of that act, enter at all reasonable times in or upon any private or public property, except private residences, that the department or the local agency has reasonable cause to believe is or will become a source contributing to air pollution and require the production of information relating to emissions that cause or contribute to air pollution. The results of any such investigations shall be reduced to writing if any enforcement action is contemplated, and a copy shall be furnished to the owner or occupants of the premises before the action is filed;

B. institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board or the local board;

C. encourage and make every reasonable effort to obtain voluntary cooperation by the owner or occupants to preserve, restore or improve air purity;

D. consult with any person proposing to construct, install or otherwise acquire an air contaminant source, device, system or control mechanism concerning the efficiency of the device, system or mechanism or the air pollution problem that may be related to the source, device, system or mechanism; provided that consultation shall not relieve any person from compliance with the Air Quality Control Act, regulations in force pursuant to that act or any other provision of law;

E. establish a small business stationary source technical and environmental compliance assistance program, consistent with the provisions of Section 507 of the federal act;

F. accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, or from any person;

G. classify and record air contaminant sources that, in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics that relate to air pollution; provided, classifications may be for application to the entire geographical area of the department's responsibility or the local authority's responsibility or to any designated portion of that area and shall be made with special reference to the effects on health, economic and social factors and physical effects on property; and

H. develop and present to the environmental improvement board or the local board a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions in the different portions of the geographical area of the department's responsibility or the local authority's responsibility.



**History:** 1978 Comp., § 74-2-5.1, enacted by Laws 1992, ch. 20, § 5.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 5 repeals former 74-2-5.1 NMSA 1978, as enacted by Laws 1985, ch. 95, § 6, relating to joint air quality control board reports, and enacts the above section,

effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**"Section 507 of the Federal act".** — The phrase "section 507 of the federal act", referred to in Subsection E, means section 507 of the federal Clean Air Act, which appears as 42 U.S.C. § 7661f.

### **74-2-5.2. State air pollution control agency; specific duties and powers of the department.**

The department is the state air pollution control agency for all purposes under federal legislation relating to air pollution. The department shall:

A. take all action necessary to secure for the state and its political subdivisions the benefits of federal legislation;

B. advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control and initiate cooperative action between a local authority and the department, between one local authority and another or among any combination of local authorities and the department for control of air pollution in areas having related air pollution problems that overlap the boundaries of political subdivisions; and

C. enter into agreements and compacts with adjoining states and Indian tribes, where appropriate.

**History:** 1978 Comp., § 74-2-5.2, enacted by Laws 1992, ch. 20, § 6.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 6 repeals former 74-2-5.2 NMSA 1978, as enacted

by Laws 1990, ch. 99, § 67, relating to solid waste incinerator regulations, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

### **74-2-6. Adoption of regulations; notice and hearings.**

A. Any person may recommend or propose regulations to the environmental improvement board or the local board for adoption. The environmental improvement board or the local board shall determine whether to hold a hearing within sixty days of submission of a proposed regulation.

B. No regulations or emission control requirement shall be adopted until after a public hearing by the environmental improvement board or the local board. As used in this section, "regulation" includes any amendment or repeal thereof. Hearings on regulations of nonstatewide application shall be held within that area that is substantially affected by the regulation. Hearings on regulations of statewide application may be held in Santa Fe or within any area of the state substantially affected by the regulation.

C. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The notice shall also state where interested persons may secure copies of any proposed regulation or air quality standard. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the environmental improvement board or the local board for advance notice of its hearings.

D. At the hearing, the environmental improvement board or the local board shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the environmental improvement board or the local board.

E. The environmental improvement board or the local board may designate a hearing officer to take evidence in the hearing.

F. No regulations or emission control requirement adopted by the environmental improvement board or the local board shall become effective until thirty days after its filing under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].



**History:** 1953 Comp., § 12-14-6, enacted by Laws 1967, ch. 277, § 6; 1970, ch. 58, § 5; 1974, ch. 64, § 2; 1981, ch. 373, § 4; 1982, ch. 73, § 25; 1992, ch. 20, § 7.

**Cross references.** — For definition of "board," see 74-2-2 NMSA 1978. As to notice by publication, see 14-11-1 NMSA 1978 et seq.

**The 1992 amendment,** effective March 5, 1992, substituted "adoption" for "promulgation" in the first sentence of Subsection A, substituted "environmental improvement board or the local board" for "board" several times throughout the section, deleted former Subsection G relating to appeals, and made minor stylistic changes throughout the section.

**Temporary provisions.** — Laws 1992, ch. 20, § 22, effective March 5, 1992, provides that all rules, regulations and administrative determinations of the environmental improvement board or a local board created by any local air quality authority and the department of environment or the administrative agency of a local air quality authority pertaining to air quality that existed prior to the effective date of the 1992 amendments to the Air Quality Control Act (March 5, 1992) set forth in that act shall remain in effect after that date until repealed or amended unless in conflict with, prohibited by or inconsistent with, the provisions of the Air Quality Control Act, as amended, and provides that all enforcement actions

taken before or after the effective date of the amendments to the Air Quality Control Act (March 5, 1992) set forth in this 1992 act shall be valid if based upon an act or failure to act that violated a provision of law or regulation in effect at the time of the act or failure to act.

**Production at hearing of supporting substantial evidence not required.** — An adjudicatory or trial-type hearing is not contemplated by this section; the validity of a regulation is not dependent upon support by substantial evidence adduced at a hearing. *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

**Notice and hearing prerequisite to granting variance.** — The environmental improvement board cannot grant a variance without first having given the public reasonable notice and a hearing on the contemplated variance. Where the notice of the hearing on a proposed amendment contains no mention of a variance, the board cannot legally grant a variance after the hearing. The order granting the variance is, therefore, void. 1976 Op. Att'y Gen. No. 76-23.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 6, 134. Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.

39A C.J.S. Health and Environment §§ 138, 142.

#### **74-2-7. Permits; permit appeals to the environmental improvement board or the local board; permit fees.**

A. By regulation the environmental improvement board or the local board shall require:

(1) any person intending to construct or modify any source, except as otherwise specifically provided by regulation, to obtain a construction permit from the department or the local agency prior to such construction or modification; and

(2) any person intending to operate any source for which an operating permit is required by the 1990 amendments to the federal act, except as otherwise specifically provided by regulation, to obtain an operating permit from the department or the local agency.

B. Regulations adopted by the environmental improvement board or the local board shall include at least the following provisions:

(1) requirements for the submission of relevant information, including but not limited to information the department or the local agency deems necessary to ensure that regulations and standards under the Air Quality Control Act [this article] or the federal act will not be violated;

(2) specification of the deadlines for processing permit applications; provided, the deadline for a final decision by the department or the local agency on a construction permit application may not exceed:

(a) one hundred eighty days after the application is determined to be complete, if the application is not affected by requirements for prevention of significant deterioration; or

(b) two hundred forty days after the application is determined to be complete, if the application is affected by requirements for prevention of significant deterioration;

(3) specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit; provided the permit regulations adopted:

(a) by the environmental improvement board shall include provisions governing notice to nearby states; and

(b) by any local board shall include provisions requiring that notice be given to the department of all permit applications by any source that emits, or has a potential emission rate of, one hundred tons per year or more of any regulated air contaminant, including any source of fugitive emissions of each regulated air contaminant at least sixty days prior to the date on which construction or major modification is to commence;



- (4) a schedule of construction permit fees sufficient to cover:
  - (a) the reasonable costs of reviewing and acting upon any application for such permit; and
  - (b) the reasonable costs of implementing and enforcing the terms and conditions of the permit, excluding any court costs or other costs associated with an enforcement action;
- (5) a schedule of emission fees consistent with the provisions of Section 502(b)(3) of the 1990 amendments to the federal act;
- (6) specification of the maximum length of time for which a permit shall be valid; provided that for an operating permit, such period may not exceed five years; and
- (7) for an operating permit only:
  - (a) provisions consistent with Sections 502(b) and 505(b) of the federal act providing: 1) notice to and review and comment by the United States environmental protection agency; and 2) that if the department or local agency receives notice of objection from the United States environmental protection agency before the operating permit is issued, the department or the local agency shall not issue the permit unless it is revised and issued under Section 505(c) of the federal act;
  - (b) provisions governing renewal of the operating permit; and
  - (c) specification of the conditions under which the operating permit may be terminated, modified or revoked and reissued prior to the expiration of the term of the operating permit.

C. The department or the local agency may deny any application for:

- (1) a construction permit if it appears that the construction or modification will not meet applicable requirements of the Air Quality Control Act, the federal act or any regulation adopted pursuant to either; or
- (2) an operating permit if:
  - (a) the source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance or a regulation of the environmental improvement board or the local board;
  - (b) it appears that the source for which the permit is sought will cause or contribute to air contaminant levels in excess of any national or state standard or, within the boundaries of a local authority, applicable local ambient air quality standards; or
  - (c) any other provision of the Air Quality Control Act or the federal act will be violated.

D. The department or the local agency may specify conditions to any permit granted under this section, including:

- (1) for a construction permit, a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the requirements of the Air Quality Control Act, the federal act and regulations promulgated pursuant to either; and
- (2) for an operating permit:
  - (a) imposition of individual emission limits, determined on a case-by-case basis, but only as restrictive as necessary to meet the requirements of the Air Quality Control Act and the federal act or the emission rate specified in the operating permit application, whichever is more stringent;
  - (b) compliance with applicable federal standards of performance;
  - (c) imposition of reasonable restrictions and limitations not relating to emission limits or emission rates; or
  - (d) any combination of the conditions listed above.

E. This section does not authorize the department or the local agency to require the use of machinery, devices or equipment from a particular manufacturer if the federal standards of performance, state regulations and permit conditions may be met by machinery, devices or equipment otherwise available.

F. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Air Quality Control Act and any applicable regulations



of the environmental improvement board or the local board. Any conditions placed upon a permit by the department or the local agency shall be enforceable to the same extent as a regulation of its board.

G. Any person who participated in a permitting action before the department or the local agency shall be notified by the department or the local agency of the action taken and the reasons for the action. Notification of the applicant shall be by certified mail.

H. Any person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board. The petition shall be made in writing to the environmental improvement board or the local board within thirty days from the date notice is given of the department's or the local agency's action. Unless a timely request for hearing is made, the decision of the department or the local agency shall be final.

I. If a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing within ninety days after receipt of the petition. The environmental improvement board or the local board shall notify the petitioner and the applicant or permittee, if other than the petitioner, by certified mail of the date, time and place of the hearing. If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.

J. The environmental improvement board or the local board may designate a hearing officer to take evidence in the hearing. All hearings shall be recorded.

K. The burden of proof shall be upon the petitioner. Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively.

L. Notwithstanding any other provision of law and subject to the provisions of Section 74-2-4 NMSA 1978, a final decision on a permit by the department, the environmental improvement board, the local agency, the local board or the court of appeals that a new source will or will not meet applicable local, state and federal air pollution standards and regulations shall be conclusive and is binding on every other state agency and as an issue before any other state agency shall be deemed resolved in accordance with that final decision.

M. Subject to the provisions of Section 74-2-4 NMSA 1978, if the local board has adopted a permit regulation pursuant to this section, persons constructing or modifying any new source within the boundaries of the local authority shall obtain a permit from the local agency and not from the department.

N. Fees collected pursuant to this section shall be deposited in:

- (1) the state air quality permit fund created by Section 74-2-15 NMSA 1978 if collected by the department; or
- (2) a fund created pursuant to Section 74-2-16 NMSA 1978 if collected by a local agency pursuant to a permit regulation adopted by the local board pursuant to this section.

**History:** 1953 Comp., § 12-14-7, enacted by Laws 1972, ch. 51, § 4; 1973, ch. 322, § 4; 1979, ch. 393, § 3; 1981, ch. 373, § 5; 1983, ch. 34, § 3; 1987, ch. 293, § 2; 1992, ch. 20, § 8.

**Cross references.** — For definitions of "department," "board" and "federal act," see 74-2-2 NMSA 1978.

**The 1992 amendment,** effective March 5, 1992, rewrote this section to the extent that a detailed comparison would be impracticable.

**Meaning of "federal act".** — See Paragraph F of

74-2-2 NMSA 1978 and notes thereto. Section 502(b) of that act appears as 42 U.S.C. § 7661a(b). Section 505(c) of that act appears as 42 U.S.C. § 7661d.

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use, 76 A.L.R.3d 388.

Application of § 165 of Clean Air Act (42 USCS § 7475), pertaining to preconstruction requirements for prevention of significant deterioration, to particu-

lar emission sources, 86 A.L.R. Fed. 255.  
39A C.J.S. Health and Environment §§ 134 to 149.

### 74-2-8. Variances.

A. The environmental improvement board or the local board may grant an individual variance from the limitations prescribed under the Air Quality Control Act [this article], any regulation of the environmental improvement board or the local board or any permit condition imposed by the department or the local agency whenever it is found, upon presentation of adequate proof:

(1) that compliance with any part of that act, any regulation of the environmental improvement board or the local board or any permit condition will:

(a) result in an arbitrary and unreasonable taking of property; or  
(b) impose an undue economic burden upon any lawful business, occupation or activity; and

(2) that the granting of the variance will not:

(a) result in a condition injurious to health or safety; or  
(b) cause or contribute to an air contaminant level in excess of any primary national ambient air quality standards.

B. No variance shall be granted pursuant to this section until the environmental improvement board or the local board has considered the relative interests of the applicant, other owners of property likely to be affected by the discharges and the general public.

C. Any variance or renewal thereof shall be granted within the requirements of Subsection A of this section and for time periods and under conditions consistent with the reasons therefor and within the following limitations:

(1) if the variance is granted on the ground that there are no practicable means known or available for the adequate prevention, abatement or control of the air pollution involved, it shall be only until the necessary means for prevention, abatement or control become known and available;

(2) if the variance is granted on the ground that compliance with the particular requirement from which variance is sought will necessitate the taking of measures that because of their extent or cost, must be spread over a considerable period of time, it shall be for a period not to exceed such reasonable time as, in the view of the environmental improvement board or the local board, is requisite for the taking of the necessary measures. A variance granted on the ground specified in this paragraph shall contain a timetable for the taking of action in an expeditious manner and shall be conditioned on adherence to the timetable; or

(3) if the variance is granted on the ground that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraphs (1) and (2) of this subsection, it shall be for not more than one year.

D. Any person seeking a variance shall do so by filing a petition for variance with the secretary or the director charged with implementation of the Air Quality Control Act at the site where the variance will apply. The secretary or the director shall promptly investigate the petition and make recommendation to his respective board as to the disposition of the petition.

E. Upon receiving the recommendation of the secretary or the director on the variance, the environmental improvement board or the local board shall:

(1) if the secretary or the director favors a variance, hold a public hearing prior to the granting of any variance; and

(2) if the secretary or the director is opposed to the granting of the variance, hold a hearing only upon the request of the petitioner.

F. In the hearing, the burden of proof shall be upon the petitioner.

History: 1953 Comp., § 12-14-8, enacted by Laws 1967, ch. 277, § 8; 1970, ch. 58, § 6; 1973, ch. 322, § 5; 1979, ch. 393, § 4; 1992, ch. 20, § 9.

Cross references. — For definitions of "board" and "director," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992,



revised the internal subsection designations in Subsection A, added Subsection A(2)(b), substituted "environmental improvement board or the local board" for "board" several times throughout the section, substituted "secretary or the director" for "director" several times throughout the section, added all of the present language of the first sentence of Subsection D following "director", and made stylistic changes throughout the section.

**Criterion for denial of variance.** — Board may deny variance when the air pollution that would result from granting variance would with reasonable probability injure health, but board may not deny variance upon mere showing that condition tends to cause harm. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 101 N.M. 291, 681 P.2d 717 (1984).

**Air Quality Standards' margin of safety does not contemplate excursions beyond legal limits.** — Petitioner's argument that Congress, by allowing an adequate margin of safety, not only contemplated but countenanced occasional excursions beyond the limits of the National Ambient Air Quality Standards is meritless since it is clear that the margin of safety protects against effects which have not yet been uncovered by research or whose medical significance is a matter of disagreement. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

**Board may rely on division's modeling results to deny variance application.** — The environmental improvement board may rely on the environmental improvement division's modeling results, showing particulate concentrations in excess of the legal limit, in arriving at its decision to deny a lumber company's application for a variance from air quality control regulations. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

**Smoke may be "injurious to health and safety".** — Smoke, in a given situation, may be composed of elements which at a given density or opacity may be "injurious to health or safety," as these words are used in Subsection A, but something more than the per-

centage of opacity must be shown. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

**Notice and hearing prerequisite to granting variance.** — The environmental improvement board cannot grant a variance without first having given the public reasonable notice and a hearing on the contemplated variance. Where the notice of the hearing on a proposed amendment contains no mention of a variance, the board cannot legally grant a variance after the hearing. The order granting the variance is, therefore, void. 1976 Op. Att'y Gen. No. 76-23.

**Burden of proving safety of variance on applicant.** — The effect of the requirement of this section that the granting of the variance must not result in a condition injurious to health or safety is to impose the duty of proving a negative on the applicant for a variance. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

**But once party makes showing, burden of going forward shifts.** — Once the party who seeks a variance and thus bears the burden of proof has made a prima facie showing, the burden of going forward with the evidence shifts to the opposing party. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of variance provisions in state and local air pollution control laws and regulations, 66 A.L.R.4th 711.

39A C.J.S. Health and Environment § 135.

## 74-2-9. Judicial review; administrative actions.

A. Any person adversely affected by an administrative action taken by the environmental improvement board, the local board, the secretary or the director may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action.

B. For appeals of regulations, the date of the action shall be the date of the filing of the regulation by the environmental improvement board or the local board pursuant to the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

C. Upon appeal, the court of appeals shall set aside the action only if found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

D. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted:

- (1) by the environmental improvement board, the local board, the department or the local agency, whichever took the action being appealed; or
- (2) by the court of appeals if the environmental improvement board, the local board, the department or the local agency denies a stay or fails to act upon an application for a stay within sixty days after receipt of the application.



**History:** 1953 Comp., § 12-14-8.1, enacted by Laws 1971, ch. 57, § 1; 1979, ch. 393, § 5; 1992, ch. 20, § 10.

The 1992 amendment, effective March 5, 1992, substituted the present section catchline for "Variances; judicial review"; in Subsection A, substituted all of the present language of the first sentence preceding "may appeal" for "Any person to whom the board denies a variance, after a hearing," and substituted "following the date of the action" for "after the board's denial" in the second sentence; rewrote Subsection B; substituted "action" for "board's denial of the variance request" in the introductory paragraph of Subsection C; and rewrote Subsection D.

**Standard of judicial review.** — The substantial

evidence rule for administrative appeals is supplemented with a "whole record" standard for judicial review of findings of fact made by administrative agency, so that the standard for upholding a decision by the environmental improvement board is whether the decision is supported by substantial evidence in record as a whole. *Duke City Lumber Co. v. New Mexico Env'tl. Imp. Bd.*, 101 N.M. 291, 681 P.2d 717 (1984).

**Law reviews.** — For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39A C.J.S. Health and Environment §§ 146 to 149.

## 74-2-10. Emergency powers of the secretary and the director.

A. Notwithstanding any other provision of the Air Quality Control Act [this article], if the secretary or the director determines that a source or combination of sources presents an imminent and substantial endangerment to the public health or welfare or to the environment, he may bring suit in the district court for the county in which the source is located to restrain immediately any person causing or contributing to the alleged air pollution to stop the emission of air contaminants causing or contributing to such air pollution or to take such other action as may be necessary.

B. If it is not practicable to assure prompt protection of the public health or welfare or the environment by commencement of a civil action, the secretary or the director may issue orders necessary to protect the public health or welfare or the environment. An order shall be effective for a period of not more than twenty-four hours, unless the secretary or the director brings a civil action before the expiration of twenty-four hours. If the secretary or the director brings an action within that time, the order shall be effective thereafter for forty-eight hours or for such longer period as may be authorized by the court pending litigation.

**History:** 1978 Comp., § 74-2-10, enacted by Laws 1992, ch. 20, § 11.

**Cross references.** — For definition of "secretary" and "director," see 74-2-2 NMSA 1978.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 11 repeals former 74-2-10 NMSA 1978, as amended

by Laws 1981, ch. 373, § 6, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 493, 538, 539.

## 74-2-11. Confidential information.

A. Any records, reports or information obtained under the Air Quality Control Act [this article] by the department, the environmental improvement board, the local board or the local agency shall be available to the public, except that upon a satisfactory showing to the secretary, the director, the environmental improvement board, the local board or the local agency, as applicable, by any person that records, reports or information, or particular parts thereof, except emission data, to which the department, the local agency, the environmental improvement board or the local board has access under the Air Quality Control Act, if made public, would divulge confidential business records or methods or processes entitled to protection as trade secrets of that person, the secretary, the director, the environmental improvement board or the local board, as applicable, shall consider such record, report or information, or particular portion thereof, confidential in accordance with the provisions of Section 14-2-1 NMSA 1978 and 18 U.S.C. Section 1905, except that such record, report or other information may be disclosed:

(1) to other officers, employees or authorized representatives of the department, the local agency, the environmental improvement board or the local board concerned with carrying out the Air Quality Control Act;

(2) to officers, employees or authorized representatives of the United States environmental protection agency concerned with carrying out the federal act; or



(3) when relevant, in any proceeding under the Air Quality Control Act or the federal act.

B. The environmental improvement board or the local board shall adopt regulations to implement this section, including regulations specifying those business records entitled to treatment as confidential records.

**History:** 1978 Comp., § 74-2-11, enacted by Laws 1992, ch. 20, § 12.

**Cross references.** — For definitions of "board" and "department," see 74-2-2 NMSA 1978.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 12 repeals former 74-2-11 NMSA 1978, as amended by Laws 1979, ch. 393, § 6, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**Board may publish nonconfidential contaminant data.** — The environmental improvement board, subject to the confidentiality provision con-

tained in this section, may make air contaminant emission data and other information available to the public. 1972 Op. Att'y Gen. No. 72-17.

**Operator of contaminant source must demonstrate confidentiality.** — The owner or operator of an air contaminant source has the burden to establish whether records or information furnished to or obtained by the environmental improvement board or any other air quality control board are entitled to confidentiality. 1972 Op. Att'y Gen. No. 72-42.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 2 Am. Jur. 2d Administrative Law § 258.

### 74-2-11.1. Limitations on regulations.

The Air Quality Control Act [this article] does not:

A. authorize the environmental improvement board or the local board to make any regulation with respect to any condition or quality of the outdoor atmosphere if the condition or air quality level and its effect are confined entirely within the boundaries of the industrial or manufacturing property within which the air contaminants are or may be emitted and public access is restricted within such boundaries;

B. grant to the environmental improvement board or the local board any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of air quality; or

C. supersede or limit the applicability of any law relating to industrial health, safety or sanitation.

**History:** 1978 Comp., § 74-2-11.1, enacted by Laws 1979, ch. 393, § 7; 1992, ch. 20, § 13.

The 1992 amendment, effective March 5, 1992, substituted "environmental improvement board or the local board" for "board" near the beginning of Subsections A and B, and deleted "except that a source which uses a supplemental or intermittent control system for purposes of complying with a pri-

mary nonferrous smelter order may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent control system or other dispersion dependent control system" at the end of Subsection B.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.

### 74-2-12. Enforcement; compliance orders; field citations.

A. Whenever, on the basis of any information, the secretary or the director determines that any person has violated or is violating any requirement or prohibition of the Air Quality Control Act [this article], any regulation promulgated pursuant to that act or any condition of a permit issued under that act, the secretary or the director may:

(1) issue a compliance order stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for any past or current violation, or both; or

(2) commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

B. Any order issued pursuant to Subsection A of this section may include a suspension or revocation of any permit, or portion thereof, issued by the secretary or the director. Any penalty assessed in the order shall not exceed fifteen thousand dollars (\$15,000) per day of noncompliance for each violation.

C. Any order issued pursuant to Subsection A of this section shall become final unless, no later than thirty days after the order is served, the person named therein submits a written request to the secretary or the director for a public hearing. Upon such request, the secretary or the director shall promptly conduct a public hearing. The secretary or the



director shall appoint an independent hearing officer to preside over the public hearing. The hearing officer shall make and preserve a complete record of the proceedings and forward his recommendation based thereon to the secretary or the director, who shall make the final decision.

D. The environmental improvement board or the local board may implement a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed one thousand dollars (\$1,000) per day of violation may be issued by officers or employees of the department or the local agency as designated by the secretary or the director.

E. Any person to whom a field citation is issued pursuant to Subsection D of this section may, within a reasonable time as prescribed by regulation by the environmental improvement board or the local board, elect to pay the penalty assessment or to request a hearing by the issuing agency on the field citation. If a request for hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final.

F. Payment of a civil penalty required by a field citation issued pursuant to Subsection D of this section shall not be a defense to further enforcement by the department or the local agency to correct a violation or to assess the maximum statutory penalty pursuant to other authorities in the Air Quality Control Act if the violation continues.

G. In determining the amount of any penalty to be assessed pursuant to this section, the secretary, the director or the person issuing a field citation shall take into account the seriousness of the violation, any good-faith efforts to comply with the applicable requirements and other relevant factors.

H. In connection with any proceeding under this section, the secretary or the director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may adopt rules for discovery procedures.

I. Penalties collected pursuant to an administrative order or a field citation shall be deposited in the:

- (1) municipal or county general fund, as applicable, if the administrative order or field citation was directed to a source located within a local authority; or
- (2) state general fund if the administrative order or field citation was directed to any other source.

**History:** 1978 Comp., § 74-2-12, enacted by Laws 1992, ch. 20, § 14.

**Cross references.** — For definitions of "department," "board," "secretary," and "director," see 74-2-2 NMSA 1978.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 14 repeals former 74-2-12 NMSA 1978, as amended by Laws 1990, ch. 99, § 68, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**Responsibility for enforcement.** — Enforcement of New Mexico regulations and standards more stringent than, or in addition to, the federal standards and regulations is the state's responsibility; the environmental improvement board has state-wide responsibility for enforcing the Air Quality Control Act but the Albuquerque-Bernalillo county air quality control board has this responsibility in the Albuquerque-Bernalillo county area. 1987 Op. Att'y Gen. No. 87-11.

**Law reviews.** — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control § 6.

Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.

Necessity of showing scienter, knowledge or intent, in prosecution for violation of air pollution or smoke control statute or ordinance, 46 A.L.R.3d 758.

Maintainability in state court of class action for relief against air or water pollution, 47 A.L.R.3d 769.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 A.L.R.3d 1267.

Air pollution control: sufficiency of evidence of violation in administrative proceeding terminating in abatement order, 48 A.L.R.3d 795.

Pollution control: preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.

Recovery in trespass for injury to land caused by airborne pollutants, 2 A.L.R.4th 1054.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.

Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

Construction, applicability and effect of § 304 of Clean Air Amendments of 1970 (42 U.S.C.S. § 1857h-2) in actions against alleged violators, 37 A.L.R. Fed. 320.

Construction and application of 42 USCS § 7604(d) pertaining to recovering costs of litigation in suits under Clean Air Act, 85 A.L.R. Fed. 118.

39A C.J.S. Health and Environment § 150.



### 74-2-12.1. Civil penalty; representation of department or local authority.

A. Any person who violates any provision of the Air Quality Control Act [this article] or any regulation, permit condition or emergency order adopted or issued pursuant to that act may be assessed a civil penalty not to exceed fifteen thousand dollars (\$15,000) for each day during any portion of which a violation occurs.

B. In any action to enforce the provisions of the Air Quality Control Act or any ordinance, regulation, permit condition or emergency order, adopted, imposed or issued pursuant to that act:

- (1) the department shall be represented by the attorney general;
- (2) a local authority that is a municipality shall be represented by the attorney of the municipality; and
- (3) a local authority that is a county shall be represented by the district attorney within whose judicial district the county lies.

History: 1978 Comp., § 74-2-12.1, enacted by Laws 1992, ch. 20, § 15.

Emergency clauses. — Laws 1992, ch. 20, § 23

makes the act effective immediately. Approved March 5, 1992.

### 74-2-13. Inspection.

The secretary or the director or an authorized representative of either, upon presentation of his credentials:

A. shall have a right of entry to, upon or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the environmental improvement board, the local board or by any permit condition are located; and

B. may at reasonable times:

- (1) have access to and copy any records required to be established and maintained by regulations of the environmental improvement board or the local board or any permit condition;
- (2) inspect any monitoring equipment and method required by regulations of the environmental improvement board, the local board or by any permit condition; and
- (3) sample any emissions that are required to be sampled pursuant to regulation of the environmental improvement board, the local board or any permit condition.

History: 1953 Comp., § 12-14-11.1, enacted by Laws 1972, ch. 51, § 8; 1992, ch. 20, § 16.

Cross references. — For definitions of "department" and "board," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992, rewrote the introductory paragraph, which formerly read: "Any employee of the department or board, upon presentation of proper department or board credentials"; in Subsection A, deleted "at reasonable times" following "have" and substituted all of the present

language of the subsection following "regulations" for "of the board"; and rewrote Subsection B, which formerly read: "may at reasonable times have access to and copy any records required to be established and maintained by regulations of the board".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 C.J.S. Public Administrative Law and Procedure § 22; 73A C.J.S. Public Administrative Law and Procedure §§ 126, 127.

### 74-2-14. Criminal penalties.

A. Notwithstanding any other provision of the Air Quality Control Act [this article], a local authority may prescribe penalties for violations of an ordinance:

- (1) regulating open-fire burning or residential incineration; or
- (2) prohibiting the removal of motor vehicle emission control devices installed as required by law and requiring the maintenance of such devices in operating condition.

B. Notwithstanding any other provision of the Air Quality Control Act, it is a petty misdemeanor to violate any regulations of the environmental improvement board:

- (1) regulating open-fire burning or residential incineration; or
- (2) prohibiting the removal of motor vehicle emission control devices installed as required by law or requiring the maintenance of such devices in operating condition.



C. Any person who knowingly commits any of the following acts is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978:

- (1) violation of any regulation relating to commercial or industrial incineration;
- (2) violation of any regulation adopting any federal standard of performance;
- (3) violation of any regulation relating to control of hazardous air pollutants; or
- (4) violation of any regulation relating to control of toxic air pollutants.

D. Any person who knowingly commits any violation of a regulation of the environmental improvement board or the local board not listed in Subsection B or C of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

E. Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under the Air Quality Control Act or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the Air Quality Control Act or any ordinance or regulation adopted pursuant thereto is guilty of a petty misdemeanor and shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000), or by imprisonment for not more than six months, or by both.

F. Any person who knowingly releases into the ambient air any hazardous air pollutant or extremely hazardous substance listed pursuant to Section 302(a)(2) of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 1102(a)(2) that is not listed in Section 112 of the federal act, and who knows at the time of the release that he creates a substantial danger of death or serious bodily injury to another person is guilty of a second degree felony and, upon conviction, shall be sentenced to a term of imprisonment not to exceed nine years or a fine not to exceed one hundred thousand dollars (\$100,000), or both. Any person, other than an individual or a governmental entity, that commits such violation is guilty of a second degree felony and shall be fined in an amount not to exceed two hundred fifty thousand dollars (\$250,000). If a conviction of any person under this subsection is for a second or subsequent violation, the maximum punishment shall be doubled with respect to both the fine and the imprisonment.

**History:** 1953 Comp., § 12-14-12, enacted by Laws 1967, ch. 277, § 11; 1970, ch. 58, § 9; 1971, ch. 277, § 25; 1973, ch. 322, § 7; 1990, ch. 99, § 69; 1992, ch. 20, § 17.

The 1992 amendment, effective March 5, 1992, in Subsection A, substituted "a local authority" for "any class A county or municipality within a class A county" in the introductory paragraph; in Subsection B, substituted "knowingly commits any of the following acts" for "violates any regulation of the board regulating commercial or industrial incineration" in the introductory paragraph, while substituting a colon for a period at the end of the paragraph, and added

paragraphs (1) to (4); and added Subsections D to F.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 51, 52.

Construction and application of preemption sections (§§ 208, 210(c)(4)) of Clean Air Act (42 U.S.C.S. §§ 1857f-6a, 1857f-6c(c)(4)), 18 A.L.R. Fed. 971.

What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.

39A C.J.S. Health and Environment § 139.

## 74-2-15. State air quality permit fund.

A. There is created in the state treasury the "state air quality permit fund" to be administered by the department. All fees collected by the department pursuant to Section 74-2-7 NMSA 1978 shall be deposited in the state air quality permit fund.

B. Money in the state air quality permit fund is appropriated to the department for the purpose of paying the reasonable costs of:

- (1) reviewing and acting upon any application for a permit;
- (2) if the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit not including any court costs or other costs associated with any enforcement action;
- (3) emissions and ambient monitoring;
- (4) preparing generally applicable regulations or guidance;
- (5) modeling, analysis and demonstrations; and



## (6) preparing inventories and tracking emissions.

**History:** 1978 Comp., § 74-2-15, enacted by Laws 1992, ch. 20, § 18.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 18 repeals former 74-2-15 NMSA 1978, as amended

by Laws 1979, ch. 393, § 9, relating to additional means of enforcement, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**74-2-15.1. Repealed.**

**Repeals.** — Laws 1992, ch. 20, § 21 repeals 74-2-15.1 NMSA 1978, as enacted by Laws 1979, ch. 393, § 10, relating to primary nonferrous smelter orders,

effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**74-2-16. Municipal or county air quality permit fund.**

A. A local authority shall create within the municipal or county treasury a fund to be known as the “\_\_\_\_\_”

(name of municipality or county)

air quality permit fund”. All fees collected by a municipality or county pursuant to Section 74-2-7 NMSA 1978 shall be deposited in the fund created pursuant to this section.

B. Money in the fund created pursuant to this section shall be used by the municipality or county only for the purpose of paying the reasonable costs of:

- (1) appealing, reviewing and acting upon any application for a permit;
- (2) if the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit, not including any court costs or other costs associated with any enforcement action;
- (3) emissions and ambient monitoring;
- (4) preparing generally applicable regulations or guidance;
- (5) modeling, analysis and demonstrations; and
- (6) preparing inventories and tracking emissions.

**History:** 1978 Comp., § 74-2-16, enacted by Laws 1992, ch. 20, § 19.

**Repeals and reenactments.** — Laws 1992, ch. 20, § 19 repeals former 74-2-16 NMSA 1978, as enacted

by Laws 1970, ch. 58, § 11, relating to declaratory judgement on regulations, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

**74-2-17. Continuing effect of existing laws, rules and regulations.**

A. The Air Quality Control Act [this article] is supplementary to other legislation and does not repeal any laws but takes precedence over any law that conflicts with the provisions of that act.

B. All county and municipal ordinances and all state, county and municipal regulations relating to air quality and air pollution are continued in effect until revised or repealed by the governmental body or administrative agency having jurisdiction; provided that copies of each ordinance and regulation:

- (1) were filed under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978] on or before May 3, 1967; or
- (2) if adopted after May 3, 1967:
  - (a) were adopted by a governmental body or administrative agency having jurisdiction to do so under the Air Quality Control Act as in effect at the time of such adoption; and
  - (b) if required by the Air Quality Control Act as in effect at the time of such adoption, have been filed under the State Rules Act.

**History:** 1953 Comp., § 12-14-13, enacted by Laws 1967, ch. 277, § 13; 1970, ch. 58, § 12; 1992, ch. 20, § 20.

The 1992 amendment, effective March 5, 1992, substituted “existing” for “present” in the section catchline; designated the formerly undesignated first

sentence as Subsection A, while therein substituting all of the present language following “repeal any laws” for “except those in direct conflict therewith”; rewrote and restructured the formerly undesignated second sentence as the introductory paragraph of Subsections B and B(1); and added Subsection B(2).



**74-2-18 to 74-2-22. Repealed.**

**Repeals.** — Laws 1981, ch. 373, § 7, repeals 74-2-18 to 74-2-22 NMSA 1978, relating to interstate

cooperation concerning air pollution, effective April 10, 1981.

**ARTICLE 2A****Wood Burning Stoves and Fireplaces**

Sec.

74-2A-1. Wood burning stoves and fireplaces; findings; county and municipal wood burning laws; exemption for indigents.

**74-2A-1. Wood burning stoves and fireplaces; findings; county and municipal wood burning laws; exemption for indigents.**

A. The legislature finds that many persons have acquired wood burning stoves to heat their homes. The legislature further finds that wood burning stoves have been encouraged as a means of reducing our country's dependence on foreign oil and are therefore in the public interest. The legislature further finds that many of the poorer citizens of our state have acquired wood burning stoves or residences with fireplaces as a means of providing cost efficient heating for their families.

B. The legislature further finds that counties and municipalities have adopted and may continue to adopt wood burning laws to prevent or reduce serious pollution problems associated with wood burning. The legislature further finds that while these laws are in the public interest, it is also in the public interest to protect the poor in our society who have wood burning stoves or fireplaces to provide cost efficient heating for their families.

C. Any county or municipality which adopts a wood burning law to prohibit burning from occurring at certain times or in certain locations shall provide an exemption procedure for indigent families who need wood burning as an essential form of cost-efficient heating for their families. The exemption procedure shall include a standard for determining when a family is considered indigent for purposes of the exemption.

**History:** Laws 1989, ch. 150, § 1.

**ARTICLE 3****Radiation Control**

Sec.

74-3-1. Short title.  
74-3-2. Radiation technical advisory council; creation and organization.  
74-3-3. Council duties; per diem.  
74-3-4. Definitions.  
74-3-5. Radiation protection consultant; radiation regulations; inspection.  
74-3-6. Continued care fund regulations; requirements; exemptions; modification.  
74-3-7. Continued care fund created; appropriation; approval; regulation.  
74-3-8. Registration of radiation equipment.

Sec.

74-3-9. Licensing of radioactive material.  
74-3-10. Exemptions.  
74-3-11. Civil penalty; injunction.  
74-3-12. Criminal penalty.  
74-3-13. Emergencies.  
74-3-14. Fluoroscopic or X-ray machines for shoe fitting; hand-held fluoroscopes; operation or maintenance prohibited.  
74-3-15. Agreement status authorized.  
74-3-16. Discrimination.

**74-3-1. Short title.**

Sections 74-3-1 through 74-3-16 NMSA 1978 may be cited as the "Radiation Protection Act".

**History:** 1953 Comp., § 12-9-1, enacted by Laws 1971, ch. 284, § 1; 1977, ch. 343, § 1.

**Cross references.** — For the Environmental Improvement Act, see 74-1-1 NMSA 1978 et seq. As to

